In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-31

CALLIE BLAINE EISNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	2
QUESTIONS PRESENTED FOR REVIEW	2
CONSTITUTIONAL PROVISIONS, STATUTES AND LEGISLATIVE HISTORY	3
STATEMENT OF THE CASE	6
REASONS FOR THE ALLOWANCE OF THE WRIT	11
1. The decision below and the decisions of the Fourth Circuit Court of Appeals are in conflict with the decisions of the Seventh Circuit Court of Appeals in the interpretation and application of 18 U.S.C. § 1952	11
2. The exclusion of all spectators from the trial and without prior notice and without an evidentiary hearing was a violation of the right to a public trial, and a denial of due process under the Fifth and Fourteenth Amendments	15
3. The judgment of conviction is void of facts to support it and the memorandum of decision and findings of fact by the trial court is shockingly wrong and thus presents substantial due process questions under the Fifth and Fourteenth Amendments	18
CONCLUSION	19

APPENDIX:

Page

Exhibit A – Decision and Findings of Fact by Trial Judge 1a

Exhibit B – Opinion of Court of Appeals 5a

Exhibit C – Judgment of Court of Appeals, April 14, 1976 ..... 19a

Exhibit D – Order Denying Petition for Rehearing, June 15, 1976 ..... 20a

CITATIONS

Page

1. *Conflict of Court of Appeals, Re: 18 U.S.C. § 1952 –*

United States v. Altobella, 442 F.2d 310 (1971) .. 13-14

United States v. Isaacs, 493 F.2d 1124 (1974), cert. denied 417 U.S. 976, 94 S. Ct. 3183, 41 L.Ed.2d 1146 14

United States v. LeFaivre, 507 F.2d 1288 (1974), cert. denied 420 U.S. 1004, 95 S. Ct. 1446 (1975) 12

United States v. McCormick, 442 F.2d 316 (1971) 14

United States v. Polizzi, 500 F.2d 856 (1974), cert. denied 419 U.S. 1120, 95 S. Ct. 802, 42 L.Ed.2d 820 13

United States v. Salsbury, 430 F.2d 1045 (1970) .. 12

United States v. Wechsler, 392 F.2d 344 (1968), cert. denied 392 U.S. 932, 88 S. Ct. 2283, 20 L.Ed.2d 1389 12

United States v. Zemster, 501 F.2d 540 (1974) 13

Legislative History 5

2. *Exclusion of Spectators and Denial of Public Trial –*

Davis v. United States, 247 F.2d 394 (1917) 15

Re Oliver, 338 U.S. 257, 63 S. Ct. 499, 92 L.Ed. 682 (1948) 17

People v. Devine, 364 N.Y.S. 2d 71, 76 (1974) 16

Tanksley v. United States, 145 F.2d 58 (1944) ... 16

Page

United States v. Crutcher, 405 F.2d 239, 242 (1968), cert. denied 394 U.S. 908, 89 S. Ct. 1018, 22 L.Ed.2d 219 15

United States v. Kobli, 172 F.2d 919, 923 (1949) .. 15

United States v. Rundle, 419 F.2d 599, 608 (1969) 15

3. *The Conviction Being Void of Facts to Support it is Shockingly Wrong and Presents Substantial Due Process Questions* —

Inland Trucking Corp. v. United States, 281 F.2d 457 (1960) 19

Morgan v. United States, 149 F.2d 185 (1945), cert. denied 326 U.S. 731, 66 S. Ct. 39, 90 L.Ed. 435 19

United States v. Kemble, 198 F.2d 889 (1952), cert. denied 344 U.S. 893, 73 S. Ct. 211, 97 L.Ed. 690 19

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———

Your Petitioner, Callie Blaine Eisner, respectfully petitions this Honorable Court for a Writ of Certiorari to review a judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this cause.

OPINIONS BELOW

Memorandum of Decision and Findings of Fact (Appendix A) was rendered by the District Court on June 12, 1976, and is not reported. The opinion of the Court of Appeals (Appendix B) is not yet reported.

JURISDICTIONAL STATEMENT

The date of the judgment of the Court of Appeals sought to be reviewed and the date of its entry is April 4, 1976 (Appendix C). An order of the Court of Appeals denying a timely filed petition for rehearing was entered June 15, 1976 (Appendix D). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether under 18 U.S.C. § 1952 – The Travel Act, which provides that whoever uses any facility in interstate commerce with intent to violate the prostitution laws of a state and "thereafter" performs or attempts to perform such unlawful acts of prostitution, the use of the word "thereafter" means the unlawful acts of prostitution must be performed after the use of any such facility in interstate commerce, so that if the sequence of events and the use of such interstate facility is after rather than before the unlawful acts of prostitution, no federal offense is committed.

2. Whether the exclusion of all spectators at the trial while the chief prosecuting witness was testifying, brought about by announcement of the trial judge without prior notice or having an evidentiary hearing, that the witness had a fear of people in the court room, constituted a violation of the basic right to a public trial under the Sixth Amendment, as well as a denial of "due process" under the Fifth and Fourteenth Amendments.

3. Whether a finding and judgment of guilty by a trial judge based upon findings of facts that acts of prostitution took place with the knowledge and consent of the accused, is a violation of the right to "due process" under the Fifth

and Fourteenth Amendments when the record is void of facts to support it.

CONSTITUTIONAL PROVISIONS, STATUTES AND LEGISLATIVE HISTORY

1. Title 18 United States Code, § 1952:

"§ 1952. Interstate and foreign travel or transportation in aid of rackteering enterprises. – (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to –

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000.00 or imprisoned for not more than five years, or both.

(b) As used in this section, 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury."

2. Sixth Amendment to United States Constitution:

AMENDMENT VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

3. Fifth Amendment to United States Constitution:

AMENDMENT V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

4. Fourteenth Amendment, Section I, to United States Constitution:

AMENDMENT XIV

Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5. LEGISLATIVE HISTORY:

(a) Committee on the Judiciary, 87th Congress, 1st Session, page 2664, House Report No. 966, August 17, 1961, on travel or transportation in aid of racketeering enterprises:

> "Also, the language in the Senate bill on page 2, line 7, 'after such travel' was eliminated as being superflous due to the insertion of the word 'thereafter' following the word 'and' on page 2, line 5. This change will conform with the requirement that an act be performed subsequent to travel. Thus, there is required the commission of an overt act after having traveled or after having used the facilities of interstate or foreign commerce."

(b) Attorney General's testimony at the Senate hearing on June 6, 1961, taken from 107 Cong. Record, Part 10, p. 13943, and as quoted in footnote 10 on page 315 of U. S. v. Altobella, 442 F. 2d 310 (7CA-1971):

> "The Committee has tightened the bill to require that the individual doing the traveling for an illegal purpose must, after his travel, perform or attempt to perform one of the acts forbidden by the bill."

(c) Senate Report No. 644, 87th Congress, 1st Session, 1961, page 2, quoted on page 314 of Altobella, supra:

> ". . . to come within the provisions of the bill some activity in furtherance of a racketeering enterprise, subsequent to the perfor-

> mance of the travel, must take place . . . accordingly the gravaman of the offense will be travel and a further overt act to aid the enterprise."

STATEMENT OF THE CASE

Petitioner, Callie Blaine Eisner, together with the manager of her nightclub located in Newport, Kentucky, were jointly indicted and tried in the United States District Court for the Eastern District of Kentucky, the charge being violation of the Travel Act — 18 U.S.C. #1952, using the Bank Clearing System as a facility in interstate commerce to cause checks to be transported from Kentucky where the business was located to Ohio where the maker of the checks lived and banked, to facilitate a business enterprise involving prostitution in violation of Kentucky law. Both petitioner and the manager, Bernice Jones, were convicted by the trial judge, a jury having been waived. Only petitioner Eisner appealed.

Jack Trainer, an Ohio resident and business man, was a patron of the nightclub. He came on various occasions; 15 times in the approximate 7 month period of August 3, 1973 through February 22, 1974. He always dealt with and had contact with Bernice Jones; never with petitioner Eisner. He did not know Eisner, never saw her at the nightclub and did not identify her in the courtroom at the trial.

Trainer in his visits to the nightclub would drink, watch the floor show, seek out the company of employee Tracy Lee Tippit and would engage in masturbation and sexual intercourse with her. *After* each visit was over he would pay for his drinks by his check sometimes making the

check for a larger amount and getting back cash in change. Bernice Jones told him to make out the checks and he gave all his checks to her. He never spoke to petitioner Eisner. In all, a total of 15 checks were issued by Trainer in this almost 7 months of visits. Only 3 of these checks found their way into the business account at the bank. Of the remaining checks, 7 were made out to Bernice Jones and 3 to cash, all of which were endorsed by Bernice Jones and taken by her to the State Bank at Dayton, Kentucky, and cashed or turned over to the bank which transmitted them to Cincinnati, Ohio through the Bank Clearing System to the Fifth-Third Bank, which was Trainer's bank, for payment. There was no evidence that petitioner Eisner initiated the process or took the checks to the State Bank, or that she ever received the proceeds. Neither was there evidence that petitioner Eisner had knowledge of illegal acts of prostitution in her place of business; Bernice Jones said she did not.

Tracy Lee Tippit was the chief government witness and the case is based primarily on her testimony (pp. 84-155, Vol. II, trial court transcript). Prior to her entering the courtroom and taking the witness stand, the following occurred in the court room, which was without prior notice to counsel for defendants or without an evidentiary hearing (pp. 81-84, Vol. II, trial court transcript):

> THEREUPON, the following occurred at the Bench:
>
> THE COURT: Gentlemen, I want you to know for the record what I propose to do.
>
> I am going to eliminate from the courtroom spectators, other than accredited members of the press. There is a reason to believe that this next witness has a fear of the courtroom and the persons that might be in it, and this Court is unable to say that that fear

is un.eal or imaginative, and accordingly, I propose to proceed in that fashion.

Mr. Marshal, would you come here, please?

You are personally familiar with the representatives of the press; is that right?

THE MARSHAL: Yes, Sir.

THE COURT: Okay. I'm going to make an announcement at this time of what I propose to do.

Now my impression also is that the two windows in that door at the back of the courtroom —

THE MARSHAL: I can close the door.

THE COURT: I would want that to be done also, and the spectators are free to remain in the hallway as long as there is no noise or other disturbance.

THE MARSHAL: Yes, Sir.

MR. WEINTRAUB: If Your Honor please, on behalf of the Defendant, Callie Eisner, we certainly register our objections.

THE COURT: What is your authority for that, Mr. Weintraub?

MR. WEINTRAUB: If Your Honor please —

THE COURT: Can you cite any authority to the Court?

MR. WEINTRAUB: If Your Honor please, I just can't reach into my head at this moment. I never anticipated anything.

THE COURT: To my understanding spectators are a matter of discretion.

MR. WEINTRAUB: My understanding has been that every trial must be a public trial at which the public can come and go, and if Your Honor please, to assume that any one single witness can more or less, say dictate, not to the Court, don't misunderstand, dictate the fact that he or she wants to testify with nobody, no spectators or anything looking at her, I think —

THE COURT: Mr. Weintraub, you weren't listening.

The representatives of the media will be permitted to stay. This is not an in-camera hearing. I don't want this record to reflect in this statement by you either unintentionally or otherwise, I'm merely saying that other than accredited members of the press I'm going to remove spectators.

You may address yourself to that situation.

MR. WEINTRAUB: Well, my objection to it is the fact, I repeat again, that every trial should be open and public trial and I think the fact that only the media are present, which I understood that Your Honor said, is insufficient. If Your Honor please —

THE COURT: Do you have any authority to cite to the Court?

MR. WEINTRAUB: No. I didn't expect this.

THE COURT: Mr. Wehrman, do you have any authority?

MR. WEHRMAN: No, Your Honor, but I would, for the record, note my objection.

THE COURT: You may do so.

———

THEREUPON, the proceedings continued in open Court as follows, to-wit:

THE COURT: At this time the Court will direct the United States Marshal to excuse all spectators other than those who are accredited members of the press or other communication media.

MR. WEINTRAUB: If Your Honor please, does it pertain to the Attorneys?

THE COURT: No. Those Attorneys who are associated with Counsel.

———

THEREUPON, all spectators were removed from the courtroom, and the proceedings continued, in the absence of spectators, excepting news media, as follows:

THE COURT: Mr. Arehart, you may call your next witness.

MR. AREHART: The United States calls Tracy Tippit.

Tippit then testified and her testimony was that Jones had hired her, told her what kind of dancing to do, what to do, brought bottles of champagne to her to be furnished Trainer. Further, that she had engaged in sexual intercourse with Trainer; had only met Mrs. Eisner on two occasions and didn't know her personally; that when she and Trainer were finished drinking and having sexual relations, Trainer would write out a check which he gave to Bernice Jones. Bernice Jones paid Tippit on regular days of pay. Bernice Jones testified that petitioner Eisner knew nothing (pp. 198, 199, Vol. III, trial court transcript). After Miss Tippit testified the trial transcript shows the following:

> "THEREUPON, the courtroom was again opened and spectators permitted to enter."

Mrs. Tippit was later recalled as a rebuttal witness by the government, and the Court at that time said (pp. 221, 222, Vol. III, trial court transcript):

> "THE COURT: Mr. Arehart, do you have any rebuttal testimony to present?
>
> MR. AREHART: Yes, Your Honor, I would like to recall Tracy Tippit.
>
> THE COURT: All right. I think we will not proceed as we did yesterday. I will admit this witness to testify with the spectators in the room."

Petitioner Eisner did not testify. The trial judge found both Eisner and Jones guilty of violating 18 U.S.C. § 1952. Eisner appealed to the Sixth Circuit Court of

Appeals which affirmed the judgment of the District Court. Jones did not appeal.

REASONS FOR ALLOWANCE OF THE WRIT

1. THE DECISION BELOW AND THE DECISIONS OF THE FOURTH CIRCUIT COURT OF APPEALS ARE IN CONFLICT WITH THE DECISIONS OF THE SEVENTH CIRCUIT COURT OF APPEALS IN THE INTERPRETATION AND APPLICATION OF 18 U.S.C. § 1952 – THE TRAVEL ACT.

In footnote 5 on the bottom of page 12a of its Opinion (Appendix B), the lower court says:

> "The Fourth and Seventh Circuits have at various times attempted to reconcile their respective views on this issue. At this point any such attempt on our part would be fruitless. In *Isaacs* the Seventh Circuit acknowledged that its view was in conflict with the ruling made in *Wechsler*. 493 F.2d at 1149. In *LeFaivre* the Fourth Circuit acknowledged that unless the Seventh Circuit decisions were limited to their precise factual settings, and there is little evidence in the language of these decisions that they are so limited, then its view was in conflict with these decisions. 507 F.2d at 1294.

The conflict between the Circuits is directly brought into the open when the Sixth Circuit then follows up in the body of its Opinion (12a, Appendix B) saying: "We also decline to adopt the approach taken by the Seventh Circuit and, rather, apply the rule stated by the Fourth Circuit in LeFaivre."

The questions of whether the acts and conduct alleged

in the indictment and brought out in the evidence even constitute a violation of § 1952 are, at the most, uncertain. Of paramount importance is the interpretation and application of the word *"thereafter"* in 18 U.S.C. § 1952 – the Travel Act, as it relates to the timing or sequence of the use of an interstate facility and the unlawful act itself. If, as petitioner urges, the indictment and facts in this case do not come within the Travel Act in the first place, and that, if it is governed by the Travel Act, the use of an interstate facility, that is, the receiving and presenting of a check from a customer to a bank in one state, which bank then places the check through the Bank Clearing System to a bank in another state for payment, then it must precede and not come *after* the unlawful activity, and if it comes *after* the unlawful activity, no federal offense is committed under 18 U.S.C. § 1952, and the federal courts do not have jurisdiction. It then becomes purely a local matter for the enforcement of prostitution laws.

Both the District Court and the Sixth Circuit Court of Appeals cast their lots with the Fourth Circuit, following the reasoning of *United States* v. *LeFaivre,* 507 F.2d 1288 (1974), cert. denied 420 U.S. 1004, 95 S.Ct. 1446 (1975), concluding that an on-going operation leaves no doubt that there was an intention to violate Kentucky law. The Fourth Circuit also dealt with section 1952 violations in *United States* v. *Wechsler,* 392 F.2d 344 (1968), cert. denied 392 U.S. 932, 88 S. Ct. 2283, 20 L. Ed. 2d 1389 (1968), where it upheld a Travel Act conviction founded upon a local official depositing into his bank account an out-of-state check that had been received as a bribe. And similarly in *United States* v. *Salsbury,* 430 F.2d 1045 (1970) where it upheld a Travel Act conviction founded upon the cashing of out-of-state checks in connection with gambling operations.

It has been held that each separate use of a facility of interstate commerce is a separate violation of section 1952. *United States* v. *Polizzi* (9CA-1974), 500 F.2d 856, cert. denied 419 U.S. 1120, 95 S.Ct. 802, 42 L.Ed.2d 820. Assuming that delivering a check for payment to a bank in one state, which bank (not the depositor) then places it in interstate commerce through the Bank Clearing System, is the use of an interstate facility (which conclusion petitioner denies) the fact remains that if each separate use of a facility of interstate commerce with intent to commit an unlawful activity (prostitution) is a separate offense, the use of the facility was *after* the commission of the unlawful activity. Section 1952 providing that the unlawful activity of prostitution must *thereafter* be performed, clearly there is no violation.

The Seventh Circuit has decided contrary to the Fourth Circuit. In the case of *United States* v. *Zemster,* 501 F. 2d 540 (7CA-1974), the Seventh Circuit was presented with a parallel fact situation except that there "travel" was alleged, whereas in this case the use of "facilities of interstate commerce" was charged. The holding was that the use of interstate facilities was only incidental to the violation of state law, and the problem was that the charge in the indictment did not comply with the statutory requirement concerning the sequence of interstate travel and the violation of state law, and, therefore, charged no offense. It pointed out that for a person to be guilty of a violation of section 1952, he must have "used a facility in interstate commerce to facilitate the carrying on" of an illegal enterprise as defined by state law "and thereafter performed the carrying on" of the unlawful activity. The "thereafter" clause constituted an express limitation on the coverage of the statute, the Seventh Circuit held.

The Seventh Circuit in *United States* v. *Altobella,* 442

F.2d 310 (1971) involved the use of the mails by bank through which extortion victim's check drawn on a Pennsylvania bank was cleared after it had been cashed in Illinois, and that Court stated that the squalid facts of the case gave rise to a serious question of federal jurisdiction under the Travel Act — 18 U.S.C. § 1952, concluding that the prosecution was beyond the limits of the criminal jurisdiction which Congress intended to confer on federal courts. Also, the Seventh Circuit dealt with whether a minimal and incidental use of an interstate facility can give rise to a violation of the Travel Act. *United States* v. *McCormick,* 442 F.2d 316 (1971); *United States* v. *Isaacs,* 493 F. 2d 1124 (1974), cert. denied 417 U.S. 976, 94 S. Ct. 3183, 41 L. Ed. 2d 1146 (1974).

The legislative history of section 1952 is to the effect that the Committee tightened the bill to require that an individual who travels for an illegal purpose must *thereafter* perform or attempt to perform a forbidden act; that to come within the provisions of the law some activity subsequent to the performance of the travel (in this case use of interstate facilities) must take place. Or, as stated in House Report No. 966 that by the insertion of the word "thereafter" it made the bill conform to the requirement that there is required the commission of an act *after* having used the facilities of interstate commerce. These will be more fully discussed if certiorari is allowed.

This conflict justifies the allowance and grant of certiorari to review the judgment below.

2. THE EXCLUSION OF ALL SPECTATORS FROM THE TRIAL AND WITHOUT PRIOR NOTICE OR WITHOUT AN EVIDENTIARY HEARING WAS A VIOLATION OF THE RIGHT TO A PUBLIC TRIAL, AND A DENIAL OF DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

The Statement of Facts recites the manner used in summarily excluding all spectators from the court room during the testimony of the government's chief witness. The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial". The Fifth and Fourteenth Amendments guarantee "due process". These basic rights were denied petitioner.

The right on an accused to a public trial is basic. *U. S.* v. *Crutcher,* 405 F.2d 239, 242 (2CA-1968), cert. denied 394 U.S. 908, 22 L.Ed.2d 219, 89 S.Ct. 1018. Actual prejudice to one who invokes this Sixth Amendment right need not be proven. *U. S. ex rel. Bennett* v. *Rundle,* 419 F. 2d 599, 608 (3CA-1969); *U. S.* v. *Kobli,* 172 F. 2d 919, 923 (3CA-1949). In the early case of *Davis* v. *U.S.,* 247 F. 394 (8CA-1917) it was held to be error from which prejudice to accused is implied where all persons except two relatives of the accused, a few newspapermen, and about ten members of the press, court attaches, the defendants and the attorneys in the case were allowed to remain. Before a court can curtail a constitutional right, the government must make a showing supporting the necessity for such action, and the mere assertion that a proposed witness is an undercover agent and that his safety is at stake if he testifies at a public trial fails to meet required test for hav-

ing public excluded during the witness' testimony. *People* v. *Devine,* 364 N.Y.S. 2d 71, 76, 77 (1974).

Tanksley v. *U.S.,* 145 F. 2d 58 (9CA-1944) held that a trial at which attendance was restricted to the parties, their counsel, officers of the law, representatives of the press, and the brother and father of the accused was not a public trial, even though it involved a rape case and embarrassment to the 19 year old prosecuting witness.

The trial court claimed it acted because of the witness' fear of testifying, but there were no facts given to support that claim, nor was an evidentiary hearing held. The opinion of the lower court opined that there was "no problem with the scope of the judge's order, since he had apparently determined that the witness was afraid of any spectator being present in the courtroom", but the big question which renders the exclusion for that apparent reason a violation of the constitutional right of the petitioner to a public trial, is best answered by the language of the Sixth Circuit's opinion (Page 12a of Appendix B):

> "The problem here, then, is not with the scope of the order or the reason for it, but rather with the sufficiency of the record made by the trial judge to support his finding that the witness was afraid of persons in the courtroom. The standard to be applied in determining whether there is a sufficient record to support a trial judge's finding that grounds exist to exclude spectators from a courtroom is whether there has been an abuse of discretion. *United States ex rel. Lloyd* v. *Vincent, supra,* 520 F.2d at 1275. We cannot say that the trial judge abused his discretion in excluding spectators other than members of the press for a limited portion of the trial. We would, however, note, as did the court in *Vincent,* that the better course would have been for the trial judge to hold an evidentiary hearing prior to deciding that there was sufficient reason to exclude spectators.

Not only was the action of the trial court a violation of the Sixth Amendment guarantee to a public trial, but it also violated petitioners Fifth and Fourteenth Amendment rights to due process, for without a public trial there can be no due process. *Re Oliver,* 338 U.S. 257, 92 L.Ed. 682, 63 S.Ct. 499 (1948).

The failure of the Sixth Circuit Court of Appeals to reverse the judgment because of this failure to protect constitutional rights, and its affirmance of the judgment, is of such great importance and is so significant in the administration of criminal justice that it justifies the allowance of the writ of certiorari so that the principle can be re-affirmed and re-stated. Discussion of the purposes served by this constitutional right of a public trial which has received universal recognition in this country is discussed *Re Oliver,* 338 U.S. 257, 92 L. Ed. 682, 63 S. Ct. 499 (1948).

3. THE JUDGMENT OF CONVICTION IS VOID OF FACTS TO SUPPORT IT AND THE MEMORANDUM OF DECISION AND FINDINGS OF FACT BY THE TRIAL JUDGE IS SHOCKINGLY WRONG AND THUS PRESENTS SUBSTANTIAL DUE PROCESS QUESTIONS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

Petitioner is cognizant of the fact that this Court will usually deny certiorari when review is sought of a lower court decision which turns upon an analysis of the particular facts involved. However, when the evidence is to the effect that the conduct and the unlawful acts were not with her knowledge and consent, and as co-defendant Bernice Jones stated that petitioner had no knowledge of the illegal acts and "knew nothing" (pp. 198-199 trial court transcript), was not ever seen in the place by witness Trainer or known by him, and chief prosecuting witness Tippit had only seen petitioner in the place of business on two occasions during her entire period of employment, it is shockingly wrong to convict on the mere fact that she was the owner of a legitimate nightclub business, had inserted ads in local area newspapers and magazines advertising the night club (not illegal activities), and that three out of 15 checks were deposited in the business checking account.

Petitioner cannot by the wildest stretch of the imagination be charged with disregarding facts when she did not know the facts existed! To find a person guilty and enter judgment upon evidence which does not remotely implicate petitioner Eisner, and to do so under the theory of "circumstantial" evidence is stretching the point to the extent that it was a deprivation of due process of the constitutional rights of petitioner under the Fifth and Fourteenth Amendments. Nothing more, nothing less can be said.

It is only when the act of an agent is with the knowledge and consent of the principal can the principal be held criminally responsible. *Morgan* v. *United States,* 149 F. 2d 185 (5CA-1945), cert. denied 326 U.S. 731, 66 S. Ct. 39, 90 L. Ed. 435.

United States v. *Kemble,* 198 F.2d 889 (3CA-1952), cert. denied 344 U.S. 893, 73 S. Ct. 211, 97 L. Ed. 690 held that a principal or master cannot be held criminally responsible for acts of his agent, without authority, express or implied, merely because it is in the course of business and within the scope of agent's employment.

Agent Jones' employment was to operate and manage a night club business, and not to engage in or allow illegal activities. A principal is not responsible for criminal activities outside scope of agent's employment. *Inland Trucking Corp.* v. *United States,* 281 F.2d 457 (1960).

The writ should be allowed, and with the filing of the entire record and transcript of evidence the denial of due process will be readily recognized.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
COVINGTON

CR. No. 74-32

(Filed June 12, 1975)

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CALLIE BLAINE EISNER and BERNICE JONES,
Defendants.

MEMORANDUM OF DECISION

This matter is before the Court following trial of the above named defendants pursuant to indictment returned by the Grand Jury of the Eastern District of Kentucky on May 7, 1974, charging these defendants with violation of 18 U.S.C. § 1952. This matter was tried to the Court upon waiver of jury trial in writing, with the approval of the Court and the consent of Government, in accordance with Rule 23 (a) of the Federal Rules of Criminal Procedure. Pursuant to Rule 23 (c), the Court does submit herewith its memorandum of decision including findings of fact therein.

I.

FINDINGS OF FACT

1. Between the period beginning August 13, 1973, and ending February 22, 1974, defendant Callie Blaine Eisner was the proprietor of a nightclub known as The Pink Pussycat, located at 604 York Street, Newport, Kentucky. During the same period of time defendant Bernice Jones acted as manager of such establishment.

2. On fifteen (15) occasions between August 13, 1973, and February 22, 1974, checks drawn upon the Fifth-Third Bank of Cincinnati, Ohio, were accepted by one or the other of the defendants from one Jack Trainor following his attendance at the Pink Pussycat establishment. A check dated August 13, 1973, in the sum of $333.50 (Government Exhibit 3A) was endorsed by defendant Callie Eisner as follows: "Pink Pussycat Callie Eisner," and deposited in the establishment's checking account at the State Bank of Dayton, Kentucky. A check dated September 4, 1973 (Government Exhibit 3B), in the amount of $839.25, was endorsed "Pink Pussycat Club" and "Callie Eisner." This check was deposited in the State Bank of Dayton, Kentucky. A check dated October 1, 1973, payable to The Pink Pussycat (Government Exhibit 3D), in the sum of $640.00 was deposited to the establishment's account in the State Bank of Dayton, Kentucky. A check dated December 6, 1973, payable to "Cash" in the sum of $1677.00 (Government Exhibit 3K), was endorsed "Bernice Jones Pink Pussycat." A check dated December 14, 1973, in the sum of $760.00 payable to "Cash," (Government Exhibit 3L) was endorsed "Bernice Jones Pink Pussycat." A check dated February 22, 1974, payable to "Cash" in the sum of $1414.55 (Government Exhibit 3-O) was endorsed "Bernice Jones Pink Pussycat." All of the foregoing checks

did move in interstate commerce between the states of Kentucky and Ohio during the period covered by the indictments herein. *See United States* v. *Salsbury*, 430 F.2d 1045 (4th Cir. 1970); *United States* v. *Wechsler*, 392 F.2d 344, *cert. den.* 392 U.S. 392 (1968).

3. Defendant Callie Eisner contracted with the Cincinnati Post and Times Star, a newspaper published in Cincinnati, Ohio, with general circulation in southwestern Ohio, southeastern Indiana, and Northern Kentucky, to advertise the Pink Pussycat (Government Exhibit 2). During the period in question the defendants placed weekly full page advertisements in a publication known as "Key Magazine," published in Cincinnati, Ohio, advertising the establishment as "Callie Blaine's Pink Pussycat (Government Exhibit 1). These acts constituted active encouragement of interstate patronage. *See Rewis* v. *United States*, 401 U.S. 808 at 813 (U.S. Sup. Ct. 1971).

4. During the period of time in question the establishment, Pink Pussycat, employed female dancers who were encouraged to sit with customers and induce them to purchase liquor. Such entertainers received a commission for all drinks so sold.

5. With the knowledge and consent of these defendants, employees of the Pink Pussycat performed acts of masturbation, oral sex, and intercourse with male customers based upon the quantity and price of liquor purchased by such partons either by the drink or by the bottle. Said defendants as operator and as manager of the Pink Pussycat set aside areas of the establishment wherein such employees could perform sexual acts to and including acts of sexual intercourse.

6. The Pink Pussycat, during the time in question,

was a place where acts of prostitution, lewdness, and assignation took place in violation of Kentucky Statute 436.075.

7. These defendants at the least persistently disregarded plain facts which were readily available to them. These defendants had an evident motive to ignore these facts and this Court as a trier of fact must reach the conclusion that rational men would reach under such circumstances. *United States* v. *Chambers,* 382 F.2d 910 (6th Cir. 1967).

8. In view of the foregoing, the United States of America has proved beyond a reasonable doubt that the Court finds that each defendant voluntarily used a facility of interstate commerce; that each defendant did promote, manage and facilitate statutorily defined activities and that each defendant did so with specific intent to facilitate a prohibited activity, to wit, offenses in violation of Section 436.075 of the laws of the Commonwealth of Kentucky.

Accordingly, such defendants are hereby found guilty of the offenses charged in Count 1 of the indictment against them.

9. The United States Government has not established beyond a reasonable doubt that either defendant Callie Blaine Eisner or Bernice Jones transported or caused to be transported any person in interstate commerce for the purpose of committing acts of prostitution, lewdness or assignation, either in violation of the laws of the State of Kentucky or the laws of the United States.

Accordingly, each defendant is hereby found not guilty of the offenses charged in Count 2 of the indictment.

/s/ CARL B. RUBIN
United States District Judge

APPENDIX B

No. 75-1908

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. CALLIE BLAINE EISNER, *Defendant-Appellant.*	APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed April 14, 1976.

Before: EDWARDS and MILLER, Circuit Judges, and CHURCHILL, District Judge.*

CHURCHILL, District Judge. The appellant was charged in a two-count indictment with violation of 18 U.S.C. § 1952, commonly known as the Travel Act. This Act makes it a federal crime to use a facility in interstate commerce to facilitate the carrying on of an unlawful activity and thereafter engage in the unlawful activity. The Act defines unlawful activity to include any business enterprise involving prostitution offenses as defined by state law. In both counts the alleged unlawful activity was prostitution,

* Honorable James P. Churchill, United States Ditrict Judge for the Eastern District of Michigan, sitting by designation.

lewdness, and assignation in violation of Kentucky Revised States § 436.075. In the first count the alleged interstate element of the offense was the use of the bank clearing system. In the second count the alleged interstate element was the transportation of a prostitute across state lines. After a bench trial the appellant was found guilty of the first count and not guilty of the second count.[1]

The testimony can be summarized as follows. The appellant between August 13, 1973, and February 22, 1974, the dates specified in the indictment, was the owner of a nightclub known as the Pink Pussycat located in Newport, Kentucky. Bernice Jones was the manager of the club.[2] The club employed dangers of the exotic variety. The testimony of one of the dancers, Tracy Tippit, and one of the customers, Jack Trainer, established that various dancers engaged in a variety of sexual acts with various customers for a price. Bernice Jones handled the day-to-day operation of the club. Tracy Tippit testified that on one occasion the appellant was present at the club when other dancers went into the back room with customers. Bernice Jones testified that she had been hired by the appellant, that the appellant kept the daily ledgers, and that the appellant often paid the dancers.

Jack Trainer paid for his entertainment with checks drawn on a Cincinnati bank. A total of fifteen (15)

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[1] The trial judge in his memorandum of decision and the government in its brief, to satisfy the Travel Act's requirement that there be the use of a facility in interstate commerce, rely in part on the fact that the defendant placed ads in certain Cincinnati newspapers. The indictment makes no mention of these acts, and this variance from the indictment cannot be the basis of a conviction. *United State* v. *Zemater*, 501 F.2d 540, 544, fn. 11 (CA7 1974).

[2] Bernice Jones was charged along with Callie Blaine Eisner in both counts of the indictment. She also was found guilty of the first count and not guilty of the second count. Jones has not appealed her conviction.

checks were introduced at the trial. Five of these checks were made out to Cash, three were made out to the Pink Pussycat, and the remainder were made out to Bernice Jones. Two of the checks, in amounts of $333.50 and $839.25 respectively, were signed in the name of the appellant as the endorser. The checks were negotiated at the State Bank of Dayton in Kentucky. Three of the checks were deposited into the account of the Pink Pussycat. The remainder were cashed. The checks were then delivered to the maker's bank in Ohio, where they were charged to his account, and the funds were then remitted back to the Kentucky bank.

Appellant assigns four claims of error.

I. SUFFICIENCY OF EVIDENCE

The appellant asserts that certain findings of fact were not supported by the evidence. The appellant acknowledges that acts of prostitution did take place at the Pink Pussycat but asserts that there was insufficient evidence to support a finding that such acts took place with her knowledge and consent. In considering a contention that the evidence is insufficient to support a judgment of conviction, an appellate court will reverse the judgment only if it is not supported by substantial and competent evidence. *United States* v. *Kubeck*, 487 F.2d 1256 (CA6 1973). Where, as here, the evidence is wholly circumstantial, the same test applies; and it is not necessary that such evidence remove every reasonable hypothesis except that of guilty. *United States* v. *Morgan*, 469 F.2d 83 (CA6 1972). A review of the testimony summarized above indicates that there was substantial and competent evidence to support

the court's finding that these activities took place with the knowledge and consent of the appellant.[3]

II. EXTENT OF USE OF A FACILITY IN INTERSTATE COMMERCE

The appellant asserts that the mere deposit or cashing of an out-of-state customer's checks, knowing that the checks will travel from Kentucky to Ohio, is such a minimal and incidental use of an interstate facility that it cannot give rise to a violation of the Travel Act. The relevant statutory language reads as follows:

> "§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.
>
> "(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to —
>
> "(1) distribute the proceeds of any unlawful activity; or
>
> "(2) commit any crime of violence to further any unlawful activity; or
>
> "(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

[3] The appellant's reliance on *United States* v. *Barnes*, 383 F.2d 287 (CA6 1967), *cert. denied* 389 U.S. 1040, 88 S.Ct. 780, 19 L.Ed.2d 831 (1968), is misplaced. There, the issue was not whether the defendants knew of the illegal enterprise but rather whether they knew that a facility in interstate commerce was used to facilitate the illegal enterprise. The government argued that it did not have to prove that all of the defendants knew of the use of the interstate facility. This Court rejected that argument and held that each defendant must have reason to know of the use of an interstate facility. This view was reaffirmed in *United States* v. *Prince*, —— F.2d —— (No. 75-1751, February 11, 1976). In this case the government proved that the appellant had reason to know of the use of an interstate facility.

> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both."

A number of cases have dealt with this issue.

In *United States* v. *Wechsler*, 392 F.2d 344 (CA4 1968), *cert. denied* 392 U.S. 932, 88 S.Ct. 2283, 20 L.Ed.2d 1389 (1968), the Fourth Circuit upheld a Travel Act conviction that was founded upon a local official deposition into his bank account an out-of-state check that had been received as a bribe. In *United States* v. *Salsbury*, 430 F.2d 1045 (CA4 1970), the Fourth Circuit upheld a Travel Act conviction that was founded upon the defendant cashing out-of-state checks in connection with a gambling operation. In both cases the court held that given the broad language of the statute, it was immaterial that the use of the interstate facilities was tangential to the illegal business.

Subsequently the Supreme Court in *Rewis* v. *United States*, 401 U.S. 808, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971), held that conducting a gambling operation frequented by out-of-state bettors does not, without more, constitute a violation of the Travel Act. The court began by noting that the ordinary meaning of the language of the Travel Act did not seem to cover the acts complained of:

> "Section 1952 prohibits interstate travel with the intent to 'promote, manage, establish, carry on, or facilitate' certain kinds of illegal activity; and the ordinary meaning of this language suggests that the traveler's purpose must involve more than the desire to patronize the illegal activity." 401 U.S. at 811.

The court then explored the legislative history and determined that Congress did not intend the Travel Act to apply to criminal activity solely because it is at times pa-

tronized by out-of-state customers. The court concluded as follows:

> "In short, neither statutory language or legislative history supports such a broad-ranging interpretation of § 1952. And even if this lack of support were less apparent, ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity, *Bell* v. *United States,* 349 U.S. 81, 83 (1955)." 401 U.S. at 812.

Subsequent to the *Rewis* decision the Seventh Circuit decided a number of cases dealing with whether a minimal and incidental use of an interstate facility can give rise to a violation of the Travel Act. *United States* v. *Altobella,* 442 F.2d 310 (CA7 1971); *United States* v. *McCormick,* 442 F.2d 316 (CA7 1971); *United States* v. *Isaacs,* 493 F.2d 1124 (CA7 1974), *cert. denied* 417 U.S. 976, 94 S.Ct. 3184, 41 L.Ed.2d 1146 (1974). In *Altobella* the victim of an extortion scheme cashed an out-of-state check in order to pay the defendants. The defendants knew that this check would have to be cashed, and the check did, in fact, travel interstate. In *McCormick* the defendant placed an advertisement in a local newspaper seeking salesmen to peddle lottery tickets. A number of copies of the ad were mailed to the newspaper's out-of-state subscribers. *Isaacs* involved a bribery scheme in which the government's proof supporting federal jurisdiction rested on evidence that three of the checks used to distribute a portion of the proceeds had traveled interstate after being deposited by the defendants. In each of these cases the Seventh Circuit reversed the Travel Act conviction, holding that there must be something more than a minimal and incidental use of a facility of interstate commerce to satisfy the jurisdictional element of a Travel Act offense. The Seventh Circuit based this interpretation of the Travel Act in part on certain language in *Rewis* and in part on a reluctance to impinge on sensitive federal-state relationships by interpreting the Act broadly.[4]

The Second Circuit dealt with this problem in *United States* v. *Archer,* 486 F.2d 670 (CA2 1973), *reh. denied, id.,* at 683 (per curiam). This case involved a bribery scheme in which the basis of jurisdiction was one phone call made by a government agent from Paris and received by one of the defendants in New York. The court reversed the convictions, and there is language in the court's opinion which indicates that it is adopting the Seventh Circuit's interpretation of the Travel Act. But in responding to the government's petition for a rehearing, the court explained its decision in very narrow terms:

> "While the Government professes alarm at the precedential effect of our decision, we in fact went no further than to hold that when the federal element in a prosecution under the Travel Act is furnished solely by undercover agents, a stricter standard is applicable than when the interstate or foreign activities are those of the defendants themselves and that this was not met here. We adhere to that holding and leave the task of further line-drawing to the future." 486 F.2d at 685-686.

Subsequent to all these decisions the Fourth Circuit was again faced with this issue in *United States* v. *LeFaivre,* 507 F.2d 1288 (CA4 1974), *cert. denied* 420 U.S. 1004, 95 S.Ct. S.Ct. 1446 (1975). In *LeFaivre* the defendants were charged with participating in a gambling operation in which the basis of jurisdiction was the fact that fourteen

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[4] *Altobella* was filed three days after *Rewis*. The court in *Altobella* did refer to the *Rewis* decision in footnote 12, but did not rely on it. Rather, the court relied on the concept of federalism. The court in *McCormick* and *Isaacs* did rely in part on *Rewis*.

(14) out-of-state checks offered in settlement of bets passed through interstate banking channels in the clearing process after having been cashed or deposited by one of the defendants. The Fourth Circuit declined to adopt the Seventh Circuit's interpretation of the Travel Act and reaffirmed the holdings of *Wechsler* and *Salsbury* that any use of an interstate facility in furtherance of one of the unlawful activities defined in the Act is enough to satisfy the jurisdictional requirements of the Travel Act.[5]

We also decline to adopt the approach taken by the Seventh Circuit and, rather, apply the rule stated by the Fourth Circuit in *LeFaivre*.

The court in *LeFaivre* pointed out that the Supreme Court in *Rewis* was speaking in the context of a fact situation that would have required extending the coverage of the Act beyond its literal language.[6] It was in this context that the Supreme Court discussed legislative history, federalism, and the need for lenity in interpreting a crim-

[5] The Fourth and Seventh Circuits have at various times attempted to reconcile their respective views on this issue. At this point any such attempt on our part would be fruitless. In *Isaacs* the Seventh Circuit acknowledged that its view was in conflict with the ruling made in *Wechsler*. 493 F.2d at 1149. In *LeFaivre* the Fourth Circuit acknowledged that unless the Seventh Circuit decisions were limited to their precise factual settings, and there is little evidence in the language of these decisions that they are so limited, then its view was in conflict with these decisions. 507 F.2d at 1294.

[6] Additional support for this view is found in the case of *United States* v. *Villano*, —— F.2d —— (CA10 January 10, 1976). There, the defendants were convicted of participating in a Colorado gambling operation. The use of interstate facilities was limited to agents of the defendants taking bets in Nebraska and making interstate phone calls to Colorado. The court upheld the convictions. The court noted that *Rewis* did not compel a contrary result, since there the Supreme Court focussed on the fact that the interstate activity was limited to the acts of the patrons.

inal statute.[7] Here, as in *LeFaivre*, the facts of the case bring it within the plain meaning of the Travel Act, and thus *Rewis* is inapposite. Facilities in interstate commerce were used every time an out-of-state check was cashed or deposited and then subsequently traveled interstate. As the court in *LeFaivre* noted:

> ". . . when a statute on its face clearly covers certain activity, as in the instant case, we believe a court should accept the statute as written and avoid plunging into the murky waters of legislative history in an attempt to fathom whether Congress really intended to reach what the language of its statute *does* reach." (Emphasis in original.) 507 F.2d at 1295.

The court in *LeFaivre* also dealt with the argument that federal criminal statutes should be narrowly construed to avoid impinging on sensitive federal-state relationships. The court noted that:

> "How far Congress should extend federal criminal jurisdiction is a matter of interest and concern to the judicial branch. But resolution of the question is not for us. There is an appropriate role, however, for the executive branch. We agree with Judge Friendly, who said in *Archer*, 486 F.2d at 678, that the responsibility for keeping federal criminal prosecutions within appropriate bounds for a federal system rests, in the first instance, with United States attorneys under the active guidance of the Attorney General. *See* Friendly, Federal Jurisdiction: A General View 55-61 (1973).
>
> "It should be emphasized that the exercise of prosecutorial discretion is common. The Mann Act fits the

[7] The Seventh Circuit in *Altobella* acknowledged that the Travel Act can be read to cover a case where the use of a facility in interstate commerce is minimal and incidental. 442 F.2d at 311

adulterer who chooses another state as the place of assignation, but such cases rarely if ever appear in a federal court. When an Asheville, North Carolina, thief steals a car, he has two or more choices of how to drive it to Charlotte — no one of which is better than another. But one way will take him through the edge of South Carolina, and that 'happenstance' will undoubtedly invoke the Dyer Act. These two kinds of cases — prostitution and car theft — are triggered indentically as is the application of the Travel Act."

507 F.2d at 1296.

There was sufficient evidence to support the trial court's finding that the appellant used a facility in interstate commerce to facilitate the carrying on of an illegal business.

III. TIMING OF USE OF A FACILITY IN INTERSTATE COMMERCE

The appellant asserts that there was no evidence that she performed any illegal acts after the checks traveled interstate. The Travel Act does required that illegal acts be performed after the use of a facility in interstate or foreign commerce. Appellant relies on *United States* v. *Zemater,* 501 F.2d 540 (CA7 1974). There, the use of a facility in foreign commerce consisted of certain of the defendants traveling to Saigon and causing others to travel to Saigon. The illegal activity that was charged in the indictment took place at a point in time prior to this trip. The court reversed the convictions in part because the illegal activity took place prior to the use of a facility in foreign commerce. In *Zemater* there was only one use of a facility in foreign commerce. In the instant case there was a series of fifteen (15) checks, and the traveling interstate of each of these checks constituted the use of a facility in interstate

commerce. Each of the checks constituted payment for illegal activities, and thus fourteen (14) of the checks were followed by additional illegal activity. The court in *LeFaivre* was met with a similar situation. A series of out-of-state checks was involved, and they were each payments on bets that had been made. There, as here, the appellants argued that the illegal activity preceded the use of a facility in interstate commerce. The court held that:

> "And since the gambling operation was on-going over a period of years, there can be no doubt that LeFaivre and the others continued to perform their illegal activity *after* the use of interstate facilities, thus meeting the Act's requirement that a person engage in the substantive offense following the involvement of interstate commerce." (Emphasis in original.) 507 F.2d at 1291.

There was sufficient evidence that the defendant performed illegal acts after the use of a facility in interstate commerce.

IV. PUBLIC TRIAL

Appellant asserts that the exclusion of spectators from the courtroom during the testimony of one of the government's witnesses was a violation of her right to a public trial. Prior to the testimony of Tracy Tippit, a former dancer at the Pink Pussycat and one of two principal witnesses for the prosecution, the trial judge made the following statement:

> "I am going to eliminate from the courtroom spectators, other than accredited members of the press. There is reason to believe that this next witness has a fear of the courtroom and the persons that might be in it, and this Court is unable to say that this fear

> is unreal or imaginative, and accordingly, I propose to proceed in that fashion."

This is the only thing in the record which indicates why the judge ruled as he did. The appellant made a timely objection to this ruling. The objection was overruled. The testimony of this witness was then taken in the absence of spectators. Members of the press were allowed to remain in the courtroom. At the close of her testimony the spectators were permitted to reenter the courtroom. When Ms. Tippit was recalled by the government as a rebuttal witness, the judge announced that spectators would not be excluded.

The purpose of the Sixth Amendment public trial requirement is to guarantee that a defendant will be fairly dealt with and not unjustly condemned. *Estes* v. *Texas,* 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965); *In Re Oliver,* 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948). The right to a public trial is not absolute but rather must be balanced against other interests which might justify the closing of the courtroom to the public. *United States ex rel. Lloyd* v. *Vincent,* 520 F.2d 1272, 1274 (CA2 1975). The propriety of the trial court's action depends on the particular circumstances of the case. *Aaron* v. *Capps,* 507 F.2d 685 (CA5 1975). If it is determined that the trial court improperly excluded the public, prejudice is implied and an affirmative showing that the defendant was harmed is unnecessary to justify reversal. *United States ex rel. Bennett* v. *Rundle,* 419 F.2d 599 (CA3 1969); *Tanksley* v. *United States,* 145 F.2d 58 (CA9 1944); *Davis* v. *United States,* 247 F. 394 (CA8 1917).

Here, the trial court acted because of the witness' fear of testifying. A number of courts have held that this is a proper basis for excluding spectators from a trial. *United States ex rel. Bruno* v. *Herold,* 408 F.2d 125 (CA2 1969); *United States ex rel. Orlando* v. *Fay,* 350 F.2d 967 (CA2 1968), *cert. denied sub nom. Orlando* v. *Follette,* 384 U.S. 1008, 86 S.Ct. 1961, 16 L.Ed.2d 1021 (1965). *Geise* v. *United States,* 262 F.2d 151 (CA9 1958), *reh. denied* 265 F.2d 659 (CA9 1959); *United States ex rel. Smallwood* v. *LaValle,* 377 F.Supp. 1148 (E.D. N.Y. 1974), and cases cited herein at fn. 4; see generally 48 A.L.R.2d 1436.

The appellant relies on *United States* v. *Kobli,* 172 F.2d 919 (CA3 1949). There, the trial court in a Mann Act case involving the transporting of a young woman to a house of prostitution excluded all of the spectators because of the fact that many young girls were in the courtroom. The Third Circuit held that this exclusion was improper because it was not limited in scope to those persons who the judge had reason to believe should have been excluded. Here, there is no problem with the scope of the judge's order, since he had apparently determined that the witness was afraid of any spectator being present in the courtroom.

The appellant also relies on *Tanksley* v. *United States, supra.* There, the trial court in a rape case in which the defense was consent excluded spectators for the entire trial to relieve the complaining witness of embarrassment. The Ninth Circuit held that this exclusion was improper. The court pointed out that the complaining witness would be embarrassed in any rape case where the defense was consent. The court then held that it would be a denial of the defendant's presumption of innocence to hold that a complaining witness must be relieved of this embarrassment. Here, unlike the situation in *Tanksley,* the judge did exclude the spectators for a proper reason — the witness' fear of people in the courtroom.

The problem here, then, is not with the scope of the order or the reason for it, but rather with the sufficiency of the record made by the trial judge to support his finding that the witness was afraid of persons in the courtroom. The standard to be applied in determining whether there is a sufficient record to support a trial judge's finding that grounds exist to exclude spectators from a courtroom is whether there has been an abuse of discretion. *United States ex rel. Lloyd* v. *Vincent, supra,* 520 F.2d at 1275. We cannot say that the trial judge abused his discretion in excluding spectators other than members of the press for a limited portion of the trial. We would, however, note, as did the court in *Vincent,* that the better course would have been for the trial judge to hold an evidentiary hearing prior to deciding that there was sufficient reason to exclude spectators.

The conviction is affirmed.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-1908

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

CALLIE BLAINE EISNER,

Defendant-Appellant.

(Filed April 14, 1976)

Before: EDWARDS and MILLER, Circuit Judges, and CHURCHILL, District Judge.

JUDGMENT

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of

the said District Court in this cause be and the same is hereby affirmed.

No costs taxed.

ENTERED BY ORDER OF THE COURT.
/s/ JOHN P. HEHMAN
Clerk

APPENDIX D

No. 75-1908

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

CALLIE BLAINE EISNER,
Defendant-Appellant.

ORDER

(Filed June 15, 1976)

Before: PHILLIPS, Chief Judge, EDWARDS, Circuit Judge, and CHURCHILL,* District Judge.

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* Honoroable James P. Churchill, United States District Judge for the Eastern District of Michigan, Southern Division, sitting by designation.

On receipt and consideration of a motion for rehearing and a suggestion of rehearing in banc under Rule 35 of the Federal Rules of Appellate Procedure; and

No active judge in this circuit having made a motion for rehearing in banc and the motion for rehearing having been referred to the panel[1] which heard the case for disposition;

Now, therefore, the court noting that no issue which had not been considered prior to the issuance of the court's opinion is presented by said motion for rehearing,

The same is hereby denied.

Entered by order of the Court

/s/ JOHN P. HEHMAN
Clerk

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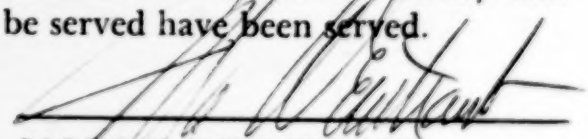
[1] The original panel in this case included Honorable William E. Miller who died on April 12, 1976. Judge Harry Phillips has been designated to replace Judge Miller in this matter.

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of July, 1976, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Hon. Eldon Webb, United States Attorney, 326 Post Office Building, P.O. Box 1490, Lexington, Kentucky 40501, and to Solicitor General, Department of Justice, Washington, D. C. 20530. I further certify that all parties required to be served have been served.



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